83-1209

CASE NO.

in the Supreme Court of the United States

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Petitioners,

vs.

BENJAMIN COLE and MIRIAM COLE, his wife; HARRY LOWENKRON and THELMA LOWENKRON, his wife; GEORGE H. WEBB and LAHJA T. WEBB, his wife on behalf of themselves and all other members of the Condominium Association of Lakeside Village, Inc., similarly situated, and CONDOMINIUM ASSOCIATION OF LAKESIDE VILLAGE, INC., a Florida corporation, not for profit, in its own interests and on behalf of its members,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

DID THE FLORIDA SUPREME COURT VIOLATE THE PRINCIPLES GOVERNING WAIVER OF FEDERAL CONSTITUTIONAL RIGHTS WHEN IT HELD THAT A CONTRACT CLAUSE INCORPORATING FLORIDA LAW "AS AMENDED" CONSTITUTED WAIVER OF A PARTY'S RIGHT TO BE FREE FROM LEGISLATIVE IMPAIRMENT OF CONTRACTS?

CONSTITUTIONAL PROVISION INVOLVED

ARTICLE I, §10

No state shall . . . pass any Bill of Attainder ex-post facto law, or law impairing the obligation of Contracts.

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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANGORA ENTERPRISES, INC.,
and JOSEPH KOSOW,

Petitioners,

vs.

BENJAMIN COLE, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners Angora Enterprises, Inc., and Joseph Kosow request that a Writ of Certiorari issue to review the judgment and opinion of the Florida Supreme Court which, according to the Respondent, holds that a lease clause agreeing to be bound by the Condominium Act

of Florida, "as the same may be amended from time to time" actually constituted a waiver of Petitioners' Article I, §10, federal constitutional right to be free from legislative impairment of contracts.

We anticipate the Respondent's interpretation of the Florida Supreme Court's decision because the economic stakes in this case are high, and Petitioners wish to avoid a costly procedural Hobson's choice by seeking certiorari or, with this Court's approval, a certificate from the Florida Supreme Court as to whether that Court decided the federal question presented by this Petition.[1]

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[1]The Petitioners have taken the position that the Florida Supreme Court could not have properly addressed the federal question of Article I, §10 waiver, and have filed a declaratory judgment action in the United States District Court for the Southern District of Florida raising the federal question. The Respondents have sought dismissal of that action, claiming the federal question was decided by the Florida Supreme Court.

The Florida Supreme Court was asked if it had decided the federal question, Appendix 1-3, but refused to answer, Appendix 5-6.

Although it may appear strange for a certiorari Petitioner to assert a Respondent' s view that the federal question was decided, fairness and good lawyering demands it. A client should not have to risk substantial loss on differing views of arcane federal jurisdictional problems.

This case is a candidate for the "certificate" process of *Lynum v. Illinois*, 368 U.S. 908 (1961), discussed *infra* at p. 11, and the Petitioners request an opportunity to seek such a certificate if the Court is unsure whether the Florida Supreme Court decided the federal question.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 439 So.2d 832 (Fla.1983). A copy of the Order Denying Rehearing and the opinion, appear at Appendix 5, 7 in this Petition. A copy of the intermediate Florida Appellate Court opinion which preceeded the Florida Supreme Court ruling is at Appendix 15.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on June 16, 1983. A timely filed petition for rehearing was denied on October 27, 1983. This Petition has been filed within 90 days of that date pursuant to Supreme Court Rule 20.2. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

Respondents sued Petitioners in the state trial court seeking, inter alia, to invalidate a condominium recreation lease which contained a clause calling for a cost of living increase every five years. The Respondents are condominium unit owner lessees. The Petitioners are the recreation lease lessors.[2]

The unit owners' complaint was dismissed by the trial court upon the Petitioners' motion to dismiss. A series of appeals ultimately led to the Florida Supreme Court opinion which prompts this Petition. The only

[2]Angora is the developer and original lessor. Kosow is a purchaser of the lease, and is tied to Angora *via* a purchase money mortgage. Appendix 10.

issue presented involves the problem posed by the contract's recreation lease escalation clause.

The escalation clause was a valid contractual provision in 1975 when the contract was signed. In 1977 the Florida legislature enacted §718.401(8)(a), Fla.Stat., which declared "that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in . . . leases . . . for recreational facilities. . . ."[3]

In *Fleeman v. Case* 342 So.2d 818 (Fla.1977), the Florida Supreme Court held that the statutory prohibition against escalation clauses did not apply to pre-existing leases, citing both legislative intent and the United States Constitution, Article I, §10, prohibition against legislative impairment of contracts. *Id.*, 342 So.2d at 818.

In the instant case, the Florida Supreme Court acknowledged the relevance of the *Fleeman v. Case*

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[3]The statute, in full, §718.401(8)(a), states:

> It is declared that the public policy of this state prohibits the inclusion of or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conveniently available commondity or consumer price index.

rationale, but found it inapplicable, because here the lease contained the following language:

> ANGORA ENTERPRISES, INC. . . . Hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 et seq. (hereinafter referred to as the "Condominium Act"), *and the provisions of said Act are hereby incorporated by reference and included herein thereby*, ...
>
> . . . .
>
> (Subsection G of Article I defines condominium act as follows:)
>
> Condominium Act, means and refers to the Condominium Act of the State of Florida (F.S. 711 Et Seq.) *as the same may be amended from time to time.*
>
> App. 12, 439
> So.2d at 834
> (emphasis added).

Based solely on that language, the Florida Supreme Court concluded that Petitioners had agreed their contract would be governed by the subsequently enacted ban on escalation clauses:

> Since the parties had agreed to be governed by amendments to the Act, they therefore

agreed to be bound by the purview of this statute.

App. 13, 439
So.2d at 834-835.

There has never been any evidence adduced on the issue of whether the "incorporation as amended clause" constituted a knowing and intelligent waiver of Petitioners' Article I, §10, right to be free from legislative impairment of contracts. The Florida Supreme Court's decision was based solely on the contractual language set forth above. Since the case entered the state appellate process on Respondents' appeal from their dismissed complaint, Petitioners have never had the opportunity to assert their answer and affirmative defense of no knowing and intelligent waiver of their Article I, §10, rights. [4]

Since there is no dispute that retroactive application of the no escalation clause statute would violate Article I, §10, this case presents the question of whether general contractual language incorporating future state law "as amended" constitutes a knowing and intelligent waiver of the constitutional right to be free from legislative impairment of contracts.

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[4]Florida Rules of Civil Procedure parallel the Federal Rules. Petitioners' successful trial court motion to dismiss Respondents' complaint for failure to state a cause of action rendered an answer and affirmative defenses unnecessary. *See* Rule 1.140(b), Florida Rules of Civil Procedure.

REASONS FOR GRANTING CERTIORARI

I

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS GOVERNING THE STANDARD FOR DETERMINING WAIVER OF FEDERAL CONSTITUTIONAL RIGHTS.

The contract clause of Article I, §10, has been historically described "as the centerpiece of the Constitution's protective armor, with the fifth amendment's ban on uncompensated takings of property serving as a kind of backstop". Tribe, American Constitutional Law, p. 457, (1978).

"[W]aiver affecting federal rights is a federal question." *Fay v. Noia*, 372 U.S. 391, 439 (1963); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972).

This Court has set a high standard for determining waiver of constitutional rights.

> In the civil area, the Court has said that "[W]e do not presume acquiescence in the loss of fundamental rights" . . . Indeed, in the civil no less than the criminal area, "Courts indulge every reasonable presumption against waiver."
>
> *Fuentes v. Shevin*, 407 U.S. 67 at 94, n. 31 (1972).

The Court continued in *Fuentes:*

> For a waiver of constitutional rights in any context must, at the very least, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.

Id., 407 U.S. at 95.

The Florida Supreme Court decision violated every precept of *Fuentes.*

The contract language incorporating Florida law "as the same may be amended from time to time" does not, on its face, amount to waiver or agreement to loss of Article I, §10, protection. Indeed, given the presumed expectation that a legislature will act in a constitutional fashion, the only presumption raised by the language is agreement to be bound by lawful legislative acts.

If voluntariness and intelligent acquiescence are the *sine qua non* for waiver, presuming contract clause waiver from "as amended" language is especially inappropriate. Contract clause violations always occur after a contract has been consummated. Article I, §10, seeks to protect parties from subsequent governmental action destroying their contractual agreements. Therefore, presuming one has voluntarily and intelligently agreed to waive rights which are not extant at the time is inconsistent with established constitutional waiver doctrine requiring "an intentional relinquishment or abandonment of a known right or privilege". *Johnson v. Zerbst*, 304 U.S. 458,464 (1938).[5]

We do not contend there can be no waiver of Article I, §10, rights. If the complaining party were aware of the significance of his language, and its consequences, waiver could be found. cf. *D. H. Overmyer*, 405 U.S. at 186.

But where the contractual language does not, on its face, constitute waiver, or where there has been no opportunity to adduce evidence relevant to the factual inquiry posed by the knowing, voluntary and intelligent standard for determining waiver, waiver cannot be found.

The Florida Supreme Court's contrary finding is in conflict with this Court's decisions. That conflict,

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[5]The *Johnson v. Zerbst* language arose in a criminal case. In the past the Court has assumed the civil waiver standard "is the same standard applicable to waiver in a criminal proceeding". *D. H. Overmyer Co.*, 405 U.S. at 185.

and the fact that this Court has never clearly addressed civil, contract clause waiver, makes this case an appropriate candidate for certiorari.[6]

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[6]The Respondents will claim that *United States Mortgage Co. v. Matthews*, 293 U.S. 232 (1934), is both apposite and dispositive. The decision, which was never referred to by the Florida Supreme Court, does not control this case.

United States Mortgage Co. v. Matthews was a depression era decision which permitted a new statutory partial limitation on the use of summary foreclosure proceedings to be applied to a pre-existing mortgage, where the mortgage contained a clause agreeing to "any amendments or additions" to Maryland mortgage law.

The case, which has apparently never been subsequently cited for the proposition now urged by the Respondent, is inapposite for several reasons.

First, the change in the Maryland law did not preclude future use of summary foreclosure procedures, it merely conditioned them upon acquiescence of 25% of the debt holders. Thus, the change was a procedural, remedial one, and not a substantive one which altered the contract so as to deny settled economic expectations and "seriously impair the value of the right" encompassed by the contract. *Richmond Mortgage Corp. v. Wachovia Bank*, 300 U.S. 124,128 (1937). Therefore, contract clause waiver was not truly an issue.

Second, there was no discussion in the case of waiver; indeed, the 1934 decision predates by nearly forty years the crystallization of the waiver standards to be applied to private contractual agreements which pose issues of fundamental constitutional rights. *Fuentes v. Shevin; D. H. Overmyer Co., Inc., v. Frick Co., supra.*

II

THE DECISION ON CERTIORARI SHOULD BE DELAYED TO PERMIT AN OPPORTUNITY TO SECURE A CERTIFICATE FROM THE FLORIDA SUPREME COURT REGARDING WHETHER A FEDERAL QUESTION WAS PASSED UPON.

We have set forth in footnote 1 the parties' respective positions regarding the question of whether the Florida Supreme Court had before it, and decided, the federal question of waiver of the rights guaranteed by the contract clause of the United States Constitution, and the Florida Supreme Court's declination of the chance to resolve the matter. See Appendix 5.

In *Lynum v. Illinois*, 368 U.S. 908 (1961), the Court deferred consideration of the petition for certiorari to accord petitioner's counsel an opportunity to secure a certificate from the Illinois Supreme Court to determine if that Court had passed upon the federal question presented by the petition.

Such a certificate, if affirmative, will support review by this Court. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20,22-23 (1974); *Herb v. Pitcairn*, 324 U.S. 117,127 (1945).

The Florida Supreme Court, if alerted to the fact that this Court's certiorari review awaits a certificate, might reconsider its earlier refusal to act, and answer the question of whether it passed upon the federal waiver issue in its opinion.

Fairness and judicial economy counsel the certificate course. If, as Respondents contend, the federal question of waiver was presented and addressed, then only this Court may review the decision.

If, as Petitioners have contended in the United States District Court, the federal question of waiver necessitates a fact finding inquiry, and the Florida Supreme Court did not reach the question, then certiorari is not yet appropriate.

It would be better for the Florida Supreme Court to provide an answer, than for the District Court, and this Court to attempt to unravel the obtuse meaning of the Florida Supreme Court's cryptic language. The press of cases in the United States District Court for the Southern District of Florida and in this Court, compels the conclusion that the *Lynum* process should be utilized.

The Petitioners suggest the certificate should state that consideration of the petition for certiorari is deferred to allow petitioners' counsel to secure a certificate from the Supreme Court of Florida as to whether its judgment addressed the federal question of the proper standard for evaluating waiver of the Article I, §10, right to be free from legislative impairment of contracts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, or the Petition should be deferred while a certificate from the Florida Supreme Court is sought.

Respectfully submitted,

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January, 1984

Appendix

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 61,378 and 61,396

ANGORA ENTERPRISES, INC., etc., et al.,

Petitioners,

vs.

BENJAMIN COLE, et ux., et al.,

Respondents.

JOSEPH KOSOW,

Petitioner,

vs.

BENJAMIN COLE, et ux., et al.,

Respondents.

SUPPLEMENTAL REQUEST FOR CLARIFICATION

Petitioners have heretofore timely filed their Motion for Rehearing which is presently pending and herewith submit for this Court's consideration their Supplemental Request for Clarification, *cf.* Rule 1:530(b), Fla.R.Civ.P.

The Court's June 16, 1983, opinion held that contract language incorporating by reference the provisions of the Florida Condominium Act "as the same may be

amended from time to time" constituted an agreement to be bound by the legislature's subsequent prohibition upon the enforcement of recreation lease escalation clauses. The Court wrote:

> Since the parties had agreed to be governed by amendments to the act, they therefore agreed to be bound by the purview of this statute. [§718.401(8)].
>
> Slip opinion at 5.

The Court acknowledged the statute could not have been validly applied, were it not for the "Agreement." The United States Constitution, Article I §10, prohibition against legislative *impairment of* contracts would have precluded its application. *See Fleeman v. Case*, 342 So.2d 815 at 818, cited in the opinion at page 5.

Petitioners pose the following question for clarification:

> DID THE COURT'S "AGREEMENT" HOLDING MEAN THAT THE INCORPORATION CLAUSE CONSTITUTED A KNOWING AND INTELLIGENT WAIVER OF PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO BE FREE FROM LEGISLATIVE IMPAIRMENT OF CONTRACTS?

The query is important. An affirmative answer would raise the federal question of what constitutes waiver of the constitutional rights to be free from

legislative impairment of contracts. A negative answer would leave the federal question available as an affirmative defense upon remand to the Trial Court. *See* Rule 1.110, Fla.R.Civ.P. This Court's opinion provides no insight into the problem; therefore, the Petitioners seek clarification.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to MARK B. SCHORR, ESQUIRE, Becker, Poliakoff & Streitfeld, P.A., 6520 North Andrews Avenue, Post Office Box 9057, Fort Lauderdale, Florida 33310, this 30th day of August, 1983.

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By: _____
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[RECEIVED]
[OCT 31 1983]

IN THE SUPREME COURT OF FLORIDA
THURSDAY, OCTOBER 27, 1983

CONSOLIDATED CASES
CASE NO 61,378

District Court of Appeal,
4th District – Nos.
79-2269 & 80-939

ANGORA ENTERPRISES, INC., ETC., ET AL.,
Petitioners,

vs.

BENJAMIN COLE, ET UX., ET AL.,
Respondents.

CASE NO. 61.396

JOSEPH KOSOW,
Petitioner,

vs.

BENJAMIN COLE, ET UX., ET AL.,
Respondents.

On consideration of the motion for rehearing and the supplemental request for clarification filed by attorneys for petitioners,

IT IS ORDERED by the Court that said motion and supplemental request are hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: [Illegible] Causseaux

C

cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. Paul T. Douglas, Judge

Chesterfield Smith, Esquire
Michael L. Rosen, Esquire
Gerald Mager, Esquire
and Maurice M. Garcia, Esquire
Robert S. Levy, Esquire
Joel D. Eaton, Esquire
Mark B. Schorr, Esquire

ANGORA ENTERPRISES, INC. etc. et al.,
Petitioners

v.

Benjamin COLE et ux., et al.,
Respondents.

Joseph KOSOW,
Petitioners

v.

Benjamin COLE et ux., et al.,
Respondents.

Nos. 61378, 651396

Supreme Court of Florida.
June 16, 1983.
Rehearing Denied Oct. 27, 1983.

EHRLICH, Justice

This is a petition to review a decision of the Fourth District Court of Appeal, *Cole v. Angora Enterprises*, 403 So.2d 1010 (Fla. 4th DCA 1981). That decision concerned enforceability of an escalation clause in a recreational lease attached to a declaration of condominium, and other issues relating to condominiums. The district court affirmed in part and reversed in part and then certified the following questions:

> (1) Whether the lessor expressly consented to the incorporation of Florida Statute 718.401(4) into the terms of the contract.

(2) Whether the rent escalation clause is rendered unenforceable.

(3) Whether the assignment and sale of the long term lease in exchange for a purchase money mortgage permits of the disbursement of funds from the registry of the court to pay said purchase money mortgage and

(4) Whether the condominium association and its unit owners may at this stage state a cause of action under the facts of this case for breach of fiduciary duty and self dealing.

403 So.2d at 1014.[1] We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution.

---

[1]The two sections under discussion are as follows:

§718.401, Fla. State. (1977)
(4)(a). In any action by the lessor to enforce a lien for rent payable or in any action by a unit owner with respect to the obligations of the lessee or the lessor under the lease, the unit owner may raise any issue or interpose any defenses, legal or equitable, that he may have with respect to the lessor's obligations under the lease. If the unit owner initiates any action or interposes any defense other than payment of rent under the lease, the unit owner or the association shall pay into the registry of the court any allegedly accrued rent and the rent which accrues during the pendency of the proceeding, when due. If the unit owner fails to pay the rent into the registry of the court, it shall constitute an absolute waiver of the unit owner's or association's defenses other than payment, and the lessor shall be entitled to default. When the unit owner has deposited the required funds into the registry of the court, the lessor may apply to the court for disbursement of all or

We hereby affirm the judgment of the district court for the reasons set forth herein.

Petitioners are Angora Enterprises, developer of a condominium and original lessor under a recreational lease, and American Capital Corporation (Viking), the parent corporation of Angora, and Joseph Kosow, the present owner and lessor of the leased property.

(Footnote 1 Continued)

part of the funds shown to be necessary for the payment of taxes, mortgage payments, maintenance and operating expenses, and other necessary expenses incident to maintaining and equipping the leased facilities or necessary for the payment of other expenses arising out of personal hardship resulting from the loss of rental income from the leased facilities. The court, after an evidentiary hearing, may award all or part of the funds on deposit to the lessor for such purpose. The court shall require the lessor to post bond or other security, as a condition to the release of funds from the registry, when the value of the leased land and improvements, apart from the lease itself, is inadequate to fully secure the sum of existing encumbrances on the leased property and the amounts released from the court registry. (8)(a) It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

Respondents Cole, et al, are owners of condominium units and the condominium association which operates those condominiums.

Prior to 1975, Angora Enterprises developed the Lakeside Village condominum complex. Although the developer sold the individual units outright, it retained title to a certain portion of the property and developed it as a recreational facility. Persons purchasing units in the condominium received a copy of the declaration of condominium with the lease for use of the recreational facilties attached to it. That document bound each unit member upon purchasing a condominium unit and becoming a member of the association to pay a proportional share of the rent on the recreational facilities. A clause in the lease called for an escalation in the rent every five years, based on an increase in the cost of living index.

This controversy centers around the escalation clauses in eleven recreational leases. Begun in 1975, the action alleged violations of both the Deceptive and Unfair Trade Practices Act, and Condominium Act, and challenged the validity of the escalation clauses. It was coupled with a motion to pay the rent into the registry of the court as provided by section 718.401, Florida Statutes (1977). The trial court dismissed the action and, while an appeal was pending, Angora assigned the lease to Kosow who assumed the existing institutional mortgage and gave back to Angora a purchase money mortgage for the balance of the sale price. The Fourth District Court affirmed in part and reversed in part. *Cole v. Angora Enterprises*, 370 S.2d 1227 (Fla. 4th DCA 1979).

The complaint was then refiled along with another motion for leave to deposit rent into the registry. Petitioner Kosow sought disbursement of the funds to make payment on the mortgage under section 718.401(4), Florida Statutes (1977). This motion was granted over respondents' objection that it was not the type of mortgage contemplated by the statute. Respondents appealed this order. The trial court again dismissed the complaint and awarded attorneys' fees to the petitioner. The district court of appeal consolidated review of this order and the review of the order to disburse funds. It then decided the cause and certified the questions as being of great public importance. We will respond to the questions in order.

[1] First, we are asked to decide whether or not the petitioner lessor expressly consented to the incorporation of section 718.401(4), Florida Statutes (1977), into the terms of the contract by virtue of the language in the declaration of condominium. That language set forth in the submission section of the declaration reads as follows:

> ANGORA ENTERPRISES, INC. . . . hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 et seq. (hereinafter referred to as the "Condominium Act."), *and the provisions of said Act are hereby incorporated by reference and included herein thereby*, ...
>
> . . . .

(Subsection G of Article I defines condominimum act as follows:)

> Condominium Act, means and refers to the Condominium Act of the State of Florida (F.S. 711 Et Seq.) *as the same may be amended from time to time.*
>
> (Emphasis added).

Further on in the declaration we find specific references to the attached long term-lease which is "attached to this Declaration and made a part thereof." The declaration is signed by the developer and the condominium association, the same two parties who signed the lease. The lease also refers back to the declaration and not only sets the monthly fee for use of the recreational facilities, but provides for a first lien on the unit owner's property should that unit owner fail to make the monthly rental payment.

The lessor argues that these are separate documents, each standing alone, but to adopt that rationale is to ignore the realities of the situation. And to say that the lessor who in his corporate capacity was both the developer and the management firm, did not agree to the terms of declaration is to refuse to see what is plainly written in black and white.

Consequently, we agree with the district court that this case as to the rent deposit statute is controlled by our decision in *Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Association*, 361 So.2d 128 (Fla. 1978), that the parties intended to be

bound by future amendments to the condominium act and as such section 718.401(4) is applicable and enforceable under the facts of the instant case.

[2] It logically follows that section 718.401(8), the statute that declares escalation clauses in recreation or land leases void and unenforceable, also was encompassed by the language in the declaration. Since the parties had agreed to be govered by amendments to the act, they therefore agreed to be bound by the purview of this statute.

Petitioners argue that this case is controlled by *Fleeman v. Case*, 342 So.2d 815 (Fla. 1977). That case held that this statute could not be applied to pre-1974 leases because the legislature did not intend retroactive effect. We are compelled to outline the distinction between *Fleeman* and the case at bar. The controlling difference is the fact that there was no language in the *Fleeman* documents evidencing consent on the part of the lessor to incorporate the Condominium Act and its future amendments into the contract. *See also Kaufman v. Shere*, 347 So.2d 627 (Fla. 3d DCA 1977).

[3] As to the last two questions, we agree with the district court's analysis. We agree with the district court that this assignee accepted the assignment with notice of the dispute over the rents. Therefore, under these circumstances, since the assignor was without power to withdraw the funds to pay other than the institutional mortgage in existence when the litigation began, the assignee must likewise be impotent to do so. *Florida East Coast Railway v. Eno*, 99 Fla. 887, 128 So. 622 (1930).

[4] Finally, we consider whether or not a condominium association and its unit owners may state a cause of action for breach of fiduciary duty and self dealing when a recreational lease is executed. This is, of course, controlled by *Avila South Condominium Association v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977). Though the association and its unit owners could have done so at an earlier stage in the litigation, it is now too late. *United States Fidelity & Guaranty Co. v. Sellers*, 197 So.2d 832 (Fla. 1st DCA), *cert. denied*, 204 So.2d 211 (Fla. 1967).

The decision of the district court is approved and this cause is remanded for further proceedings.

Both parties have petitioned for attorneys' fees. Pursuant to section 718.303(1), Florida Statutes (1981) and the terms of the lease, the respondents as the prevailing parties are entitled to recover reasonable attorneys' fees. The case is remanded to the trial court for determination of such fees.

It is so ordered.

ALDERMAN, C.J., and ADKINS, OVERTON and McDONALD, JJ., concur.

BOYD, J., dissents.

Benjamin COLE and Miriam Cole,
his wife, et al, Appellants,

v.

ANGORA ENTERPRISES, INC., etc., et al, Apellees.

Nos. 79-2269, 80-939.

District Court of Appeal of florida,
Fourth District.

July 15, 1981.

Rehearings Denied Oct. 8, 1981.

LETTS, Chief Judge.

Before us is yet another appeal emanating from a condominium dispute over a long term recreational lease and a trial judge's order permitting disbursement of moneys held in the registry of the court pursuant to Section 718.401(4) and 718.401(8), Florida Statutes (1977). As a result the trial judge also awarded attorneys fees to the lessor under the lease. We reverse in part and in so doing consider only those facts and legal issues which are dispositive of this particular litigation.

We are, of course, familiar with the Supreme Court's decision in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979) holding this very statute unconstitutional. However, *Pomponio* is not dispositive of the case now before us by reason of the Supreme Court's own concluding *Pomponio* language

holding that the statute may be valid if the lessor's express consent to the statute's incorporation into the terms of the contract has been obtained.

[1] We must, therefore, first answer the question: Has the lessor expressly consented to the statute's incorporation into the terms of the contract in the case now before us? We believe the answer is "yes." In support of our conclusion we refer to the Supreme Court's ruling in *Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Association*, 361 So.2d 128 (Fla. 1978)[1] where the court found that it need not reach the constitutional question because the developer "by specific language contained in its Declaration of Condominium, expressly agreed to be bound by all future amendments to the Condominium Act, including, but not limited to Section 711.63(4)."[2] Id. at 132. We are of the opinion that the language quoted from the declaration in *Century Village* is virtually

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[1]See also the very recent decision in *Coral Isle East Condominium v. Snyder*, 395 So.2d 1204 (Fla. 3d DCA 1981).

[2]Section 711.63(4) was, of course, the precursor to Section 718.401(4).

identical to the language employed in the declaration now before us and they are set forth below for comparison:

CENTURY VILLAGE DECLARATION	DECLARATION NOW BEFORE US
. . . [the developer] hereby states and declares that said realty, . . . together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 Et. Seq. (hereinafter referred to as the "Condominium Act"), *and the provisions of said Act are hereby incorporated by reference and included herein thereby*	ANGORA ENTERPRISES, INC. hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 et seq. (hereinafter referred to as the "Condominium Act"), *and the provisions of said Act are hereby incorporated by reference and included herein thereby* . . . .
The "Condominium Act" referred to above is defined in Section I(G) as follows:	(Subsection G of Article I defines condominium act as follows:)
Condominium Act means and refers to the condominium act of the State of Florida (Florida Statutes 711, et. seq.) *as the same may be amended from time to time.* 361 So.2d 128, 133. (emphasis in original).	Condominium Act, means and refers to the Condominium Act of the State of Florida. (F.S. 711 et. seq.) *as the same may be amended from time to time.* (R.S. 2-3) (Emphasis added).

Notwithstanding the above, the lessor argues that such language comes from the "submission statement" portion of the subject declaration and that in counsel's words "The submitted property . . . does not include (and no argument is made that it includes) the property which forms the subject matter of the Long-Term Lease." From this counsel for the lessor in an excellent brief concludes:

> Since the leased property *is not* part of the realty *submitted* to condominium *pursuant* to the *Condominium Act*, as that term is defined in the Declaration, the demised property and the lease itself are unaffected by the submission . . . The submission statement only relates to condominium property, not leased property or any other parcel.

We are impressed by this argument, but cannot distinguish it from the Supreme Court's holding in *Century Village*. The lessor suggests that this argument was never raised in *Century Village* and the point therefore not considered. However, whether specifically raised or not, the point would have to be inherent in the *Century Village* holding. Moreover we feel that fundamental fairness should dictate otherwise. The subject submission statement makes at least three patent references to the long term lease which is annexed thereto as an exhibit. As such, it was obviously intended to be an integral part of the whole. One cannot issue forth with language in the submission statement such as: "which long-term lease is attached to this Declaration and made a part hereof" and then argue that that same lease is not a part thereof pursuant to the condominium act.

We thus decide that Section 718.401(4) is applicable and enforceable under the facts of the instant case. That being so it is also inescapable that Section 718.401(8) is also applicable so that the enforceability of the rent escalation clause is void for reasons of public policy. In so holding we recede from any statement to the contrary set forth in our prior decision in *Palm Aire Country Club Association No. 2, Inc. v. F. P. A. Corporation*, 357 So.2d 249 (Fla. 4th DCA 1978) even though the instant lease, as did the one in *Palm Aire*, provides for its own exclusive method of amendment.

Concluding on this question, we would be less than candid not to concede that it appears unlikely that it could ever have been the specific intention of the developer-lessor to incorporate future Condominium Act amendments which would, for instance, preclude the collection of escalation clause rents. It is perfectly obvious that the "from time to time" language was intended to provide a safety valve and fall back position for the developer to insure the continuing integrity of the condominium from the vagaries of the legislature and the appellate courts. However, the developer-lessor should not expect to be able to invoke the "from time to time" language when it suits its purpose to do so and reject it when not to its taste and advantage. The developer-lessor has quite simply been hoisted on its own petard by these particular amendments.

Having decided the applicability of the statute, we turn now to a new twist which must be a credit to the ingenuity of this particular lessor. As we have seen, Section 718.401(4) also provides for disbursement of funds "shown to be necessary for the payment of . . . mortgage payments." Pursuant to this provision

the instant lessor, while in the middle of this law suit, has assigned his long-term lease to a third party who, for no money down, has given the lessor back a purchase money mortgage and note at 6% with no personal liability to the maker. Needless to report it is now claimed that the payments to be made on the purchase money mortgage qualify as "mortgage payments" under the statute which may be withdrawn from the registry of the court. To cries of "foul" from the unit owners, the lessor points to our own language in *Palm Aire*, supra, and parodies Gertrude Stein to the effect that "a mortgage is a mortgage is a mortgage."

[2, 3] Regardless of the bona fides of the mortgage, the record reflects that the assignee accepted the assignment with notice of the dispute over the rents. This being so, it is not important whether the purchase money mortgage and note were executed at arms length, it being our conclusion that an assignee with notice accedes to no greater rights than his assignor. *Florida East Coast Ry. Co. v. Eno*, 128 So.622 (Fla. 1930), *Alderman Interior Systems, Inc. v. First National-Heller Factors, Inc.*, 376 So.2d 22 (Fla.2d DCA 1979). As a consequence, since the assignor was without power to withdraw the funds (other than for purposes conceded by all parties, such as payment of the institutional mortgage) the assignee must be likewise impotent to do so. Our conclusion is not a finding that the purchase money mortgagor need not make his payments; it is, however, a holding that he cannot withdraw the funds to do so from the registry of the court.

[4] Passing next to the question of attorneys fees, we note the provisions of Section 718.125, Florida Statutes (Supp. 1978) which provides:

> If a contract or lease between a condominium unit owner or association and a developer contain a provision allowing attorneys fees to the developer, should any litigation arise under the provisions of the contract or lease, the court shall also allow reasonable attorney's fees to the unit owner or association when the unit owner or association prevails in any action by or against the unit owner or association with respect to the contract or lease.

Notwithstanding the foregoing quoted language the trial court struck the unit owners request for same. Needless to say the trial court was only being consistent in so doing, but in the light of our holding that the developer-lessor expressly consented to be bound by amendments to the law, we see no reason why an attorneys fee cannot here be awarded to the unit owners (and/or association) because the lease in question provided for attorneys fees upon the occasion of litigation.

This being so we see no necessity to examine any other of the theories advanced for the award of attorneys fees and on this issue we therefore remand this cause for consideration of reasonable attorneys fees. In so doing we make no determination as to the proportionate share to be paid by the original lessor-developer and the assignee who now stands in the original lessor's shoes. The apportionment of said fees shall be made at the discretion of the trial court as it may deem appropriate.

[5-7] Finally, we consider whether a condominium association and its unit owners may state a cause of action for breach of fiduciary duty and self dealing when a recreation lease is executed. The answer is yes, of course they can, so long as they come within the dictates clearly set forth in *Avila South Condominium Association, Inc. v. Kappa Corporation*, 347 So.2d 599 (Fla. 1977). However, that remedy is simply not available here because of the posture of this appeal. The original complaint in this dispute, up through the third amendment thereto, has already been appealed to this court and a decision rendered in *Cole v. Angora Enterprises, Inc.*, 370 So.2d 1227 (Fla. 4th DCA 1979). A reading of that third amended complaint reveals no attempt whatever to plead breach of fiduciary duty or self-dealing arising from the execution of the long term lease. This being so, the law is clear on this subject. Upon remand after a successful appeal the litigant may not invoke new causes of action and thus litigate his case piecemeal, otherwise "one party would thus be placed in position to prevail over the other by the process of attrition." *United States Fidelity & Guaranty Co. v. Sellers*, 197 So.2d 832, 833 (Fla. 1st DCA 1967). See also *Palm Beach Estates v. Croker*, 143 So. 792 (Fla. 1932).

We are of the belief that this decision will have wide repercussions affecting condominium living and that our conclusions here should be certified to the Supreme Court as questions of great public importance. We therefore certify this entire decision so that our Supreme Court may pass upon the four principal issues here decided. These issues involve: (1) Whether the lessor expressly consented to the incorporation of Florida Statute 718.401(4) into the terms of the contract. (2)

Whether the rent escalation clause is rendered unenforceable. (3) Whether the assignment and sale of the long term lease in exchange for a purchase money mortgage permits of the disbursement of funds from the registry of the court to pay said purchase money mortgage. And (4) whether the condominium association and its unit owners may at this stage state a cause of action under the facts of this case for breach of fiduciary duty and self dealing.

REVERSED IN PART AND REMANDED.

STONE, BARRY J., Associate Judge, concurs.

ANSTEAD, J., concurs in part and dissents in part with opinion.

ANSTEAD, Judge, concurring in part and dissenting in part:

I disagree only with the holding of the majority with reference to the appellants' right to attempt to state a cause of action "for breach of fiduciary duty and self dealing" pursuant to *Avila South Condominium Association, Inc. v. Kappa Corporation*, 347 So.2d 599 (Fla. 1977).